



May 18, 2021

The Honorable Steven C. González
Chief Justice, Washington Supreme Court
PO Box 40929
Olympia WA 98504-0929

Sent via email to supreme@courts.wa.gov

Dear Chief Justice González:

On behalf of Washington's 39 counties, we write to express our concern with rules proposals we recently learned were submitted by the Office of Public Defense and Washington Defender Association. According to the Washington Association of Prosecuting Attorneys (WAPA), the Court may act on a proposal to amend CrR 3.1 and CrR 7.8 as soon as this month and without the opportunity for public comment. Indeed, these rules proposals have not been published on the courts.wa.gov website, and we would not know of them but for WAPA's courtesy.

These proposals aim to require legal counsel to be provided at no cost to the defendant in certain circumstances *regardless of a finding of indigency*. Accordingly, WSAC contends that these proposals are both legally and fiscally imprudent.

From a legal standpoint, there is no constitutional or statutory right to counsel that supports the proposed amendments¹, and a court rule cannot compel the expenditure of public funds beyond a constitutional mandate or statute. Where counsel is not constitutionally required, the decision of whether to provide an attorney at public expense resides with the legislature.² To the extent the proposed amendments would provide counsel without regard to a determination of indigency, it will require an unconstitutional gift of public funds.³

From a fiscal perspective, the counties, once again, find themselves in the position where they will not have the ability to raise the revenue necessary to fulfill the obligation the court seeks to

¹ See, for example, *Ross v. Moffitt*, 417 U.S. 600, 612, 616, 41 L. Ed. 2d 341, 94 S. Ct. 2437, 2444-45, 2447 (1974) (The State is not required "to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.")

² See generally *In re Marriage of King*, 162 Wn.2d 378, 397-98, 174 P.3d 659 (2007) (Decision to publicly fund counsel in dissolution proceedings when the constitution does not mandate the appointment of counsel falls to the legislature, not to the courts.)

³ See Const. art VIII, sec. 7

impose. As is well known, the legislature provides a pittance of indigent defense funding, leaving the counties to cover 96% of the ever-escalating costs. With counties' primary revenue source arbitrarily capped, expenses already exceed revenue in many cases. Similarly, county funds are often siloed, and with few exceptions, counties may not transfer funds from one use to another.

Thus, providing counsel to those who can afford it may result in more harm than good. For example, to provide counsel under this proposal, counties may have to offset that cost by decreasing non-mandatory services such as therapeutic courts, courthouse facilitators, reductions in staffing levels, or delayed maintenance and capital improvements.⁴

While it may appear that counties are flush with funds due to federal funding like the American Rescue Plan, it must be remembered that those funds have particular, limited purposes relating to pandemic response and recovery.

Counties do not have resources readily at their disposal to fund the provision of counsel to those who have not been deemed indigent. In reality, they barely have the funds necessary to pay for indigent defense counsel under existing mandates. This current lack of adequate funding has resulted in a patchwork system of defense wherein some counties can provide more services than others. Those unequal resources necessarily result in constitutional but inequitable service levels.

For these legal and fiscal reasons, we respectfully request that the Court decline to adopt this proposal.

Sincerely,



Mellani McAleenan
General Counsel

C:

The Honorable David Estudillo, President of the Superior Court Judges' Association

⁴ See, for example, brief of Amici Curiae Washington State Association of Counties and Washington State Association of County Clerks in *Bednarczyk v. King County*, No. 96990-6.